

The Rule of Law Legacy of the House of Lords' Pinochet Judgments[†]

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I. Introduction

As the use of the plural in the title for this Session indicates, the House of Lords delivered more than one judgment in the Pinochet case.

The first, which I shall call Pinochet 1, was delivered on 25 November 1998 after a hearing which began just six days after the case left the Court of Appeal and lasted for six days between 4 and 12 November 1998: *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [2000] 1 AC 61. It was decision by five Law Lords. They held by a majority of three to two that, while the UK legislation was to be construed as conferring on a former head of state immunity from the criminal jurisdiction of the UK with respect to official acts performed in the exercise of his functions as head of state, the crimes of torture and hostage-taking fell outside what international law would regard as functions of a head of state. So Senator Pinochet's status as a former head of state did not confer immunity from extradition proceedings in respect of the crimes charged against him by the Spanish prosecutor.

The second, which I shall call Pinochet 2, was delivered on 15 January 1999 after a hearing which lasted for three days between 15 and 17 December 1998: *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 2) [2000] 1 AC 119. It was decision by a different panel of five Law Lords. They held that the decision of 25 November 1998 must be set aside. This was because Lord Hoffmann, who was one of the members of the original panel, was an unpaid director and chairman of a UK charity which was controlled by Amnesty International, one of the objects of which was to procure the abolition of torture. Although there was no suggestion that Lord Hoffmann could be regarded personally as a party to the proceedings or that he was for any other reason actually biased, his connection with Amnesty International, which had intervened

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in Pinochet 1 and been heard by counsel, was sufficient to lead to his automatic disqualification from sitting on the case.

The third, which I shall call Pinochet 3, was delivered on 24 March 1999 after a hearing which lasted for twelve days between 18 January and 4 February 1999: *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147. It was a decision by a panel of seven Law Lords, with one dissent, that Senator Pinochet had no immunity from extradition for offences of torture or conspiracy to torture which were said to have occurred after 8 December 1988 when acts of torture committed outside the UK became punishable as an offence in the UK. So his extradition could proceed on those charges, but not on charges that related to acts which were said to have been committed before that date or on the allegations of hostage-taking which were not supported by sufficient particulars. The effect of this decision was to narrow very considerably the range of offences for which he could be extradited as compared with those which were the subject of the decision in Pinochet 1.

Two aspects of the case stand out immediately from this brief narrative. The first aspect is the speed with which these proceedings were conducted. The length of the oral hearings may seem remarkable to many of you—six days for Pinochet 1, three days for Pinochet 2 and twelve days for Pinochet 3. But fully reasoned judgments were delivered within two weeks on the first occasion, within four weeks on the second and within seven weeks on the third. The House of Lords continues to value its tradition of disposing of appeals by means of oral hearings rather than predominantly on paper. This speeds up, rather than delays, the process of delivering judgment on the case.

The second aspect is the fact that the oral hearing in Pinochet 3 was twice as long as in Pinochet 1: twelve days instead of six. The reason for this is that the parties had more time to research and think through the arguments that were to be presented on both sides. In consequence their Lordships who sat on Pinochet 3 were presented with arguments of distinctly better quality. The judgments which were delivered in that appeal are, as a result, much more fully reasoned than those that were delivered in Pinochet 1. It is to those judgments, rather than those delivered in Pinochet 1, which are no longer authoritative, that you should go if you wish to follow the reasoning that led to the decision that a former head of state does not enjoy immunity from prosecution, or from extradition as the case may be, for acts of official torture for which, as head of state, he is alleged to have been responsible.

While it was unfortunate that the decision in Pinochet 1 had to be set aside because of Lord Hoffmann's involvement, the law as a whole has benefited from the more detailed scrutiny which the subject received in Pinochet 3. It was an accident of fate that Lord Hoffmann sat on Pinochet 1 at all. It had been decided that the case in which the Court of Appeal had delivered a judgment in Senator Pinochet's favour only six days before the start of the hearing in Pinochet 1, had to be treated as one of the utmost urgency. It had also been decided that those who were to sit on the appeal were the most senior Law Lords then available. The Senior Law Lord, Lord Browne-Wilkinson, was not available as he had undertaken that week to attend the opening of the re-constituted European Court of Human Rights in Strasbourg. So he did not sit on that occasion. Had it been otherwise Lord Hoffmann, who was the junior member of the panel, would have missed the cut, and there would have been no Pinochet 2 and no Pinochet 3. As the Law Lord

next junior to Lord Hoffmann I had missed the cut for Pinochet 1 anyway. So I was one of those who was selected on grounds of seniority to sit on Pinochet 3.

II. International Crimes and Domestic Law

The first aspect of the decision in Pinochet 3 on which I should like to offer comment is what it has to tell us about the interaction between customary international law and domestic law. There are, in our experience in the UK, two ways that international norms may be given effect in the domestic system.

The first is achieved by means of treaties. This requires a combination of executive and legislative action. A treaty does not have the force of law in the United Kingdom merely by virtue of the fact that it has been entered into by the executive. But once it has been made part of domestic law by the legislature it is as much part of our law as any other part. International conventions are widely used as a means of achieving uniformity in the treatment of issues of mutual interest among nations. They count as treaties for this purpose. The European Convention on Human Rights, which was made part of UK law by the Human Rights Act 1998, is one example. The Treaty of Rome, which was made part of UK law when we joined the European Communities in 1972, is another.

The other way that international norms may be given effect domestically in the UK is by their recognition by the judges as part of what is known as customary international law. This is a long established doctrine, dating back to the 18th century. It has its roots in a rule of public policy, which requires the domestic courts to give effect to clearly established rules of international law, just as states are required to respect these standards in their dealings with each other. As Lord Millet said in his judgment in Pinochet 3, customary international law is part of the common law. The doctrine of sovereign immunity provides us with a good example of the kind of norms that are in issue here. This is a doctrine of international law regulating transactions between persons in different states, whose limits are informed by practice in other jurisdictions.

Their Lordships were divided in Pinochet 3 on the question whether the systematic use of torture and hostage-taking as aspects of state policy were crimes under customary international law. Two members of the panel were in favour of this proposition. The majority view was that there was insufficient evidence that customary international law had developed this far before the coming into effect of the relevant international Conventions. The key to the case for them, therefore, lay in the Conventions. The International Convention against the Taking of Hostages of 18 December 1979 was made part of the law of the United Kingdom by the Taking of Hostages Act 1982. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 was made part of domestic law by section 134 of the Criminal Justice Act 1988 which was brought into effect on 8 December 1988.

The majority view had important implications. The Spanish prosecutor sought Senator Pinochet's extradition to Spain for trial on numerous charges of conspiracy to torture in relation to acts committed between 1 January 1972 and 1 January 1990. The House of Lords held, applying the dual criminality principle, that it was only on offences of torture that were said to have occurred after 8 December 1988 that he could be extradited. This had the effect of reducing the number of torture charges that were relevant in his case, of which there were said to have been about 4,000 victims over the entire period, to just two.

My abiding memory of the case is of one evening shortly before we delivered our judgment in Pinochet 3 when Chileans who had been demonstrating peacefully in Parliament Square throughout these hearings placed crosses on the grass in the gathering darkness for every one of the victims of the campaign of torture for which Senator Pinochet was said to have been responsible. I knew by then, as I had been dealing with this aspect of the judgment, that the number of torture victims for whose treatment he could be extradited had been reduced to only two out of the 4,000. But I was able to say in my judgment that the information with which we had been provided supported the inference that systematic torture was being pursued as an instrument of state policy when these acts were perpetrated. This therefore was an offence contrary to the Torture Convention for which there was no immunity.

III. Wider Aspects

For obvious reasons, I shall leave it to my colleagues in this session to develop such criticisms of the judgments in Pinochet 3 as may be appropriate. There are limits beyond which it would not be proper for me to go as one of the judges who sat on the case. But I believe that our decision was widely welcomed. And there is no doubt that it has grown in significance as a warning to all those in high places who may be tempted to authorise, or even to condone, the use of torture as an instrument of state policy. They cannot expect to find a hiding place from prosecution in any democratic country which respects the Rule of Law and is a party to the Torture Convention.

Nevertheless the revulsion which we all feel about the use of torture must not lead us to think that it was an easy case. Lord Goff's dissenting judgment deserves to be read carefully. He stresses the importance and wide reach of the concept of state immunity. As he explains, the fact that torture is a crime does not of itself mean that state immunity can never apply to it. He points out that there was no settled practice prior to the Torture Convention to exclude state immunity in respect of such crimes, except when it was used as part of a widespread or systematic attack against a civilian population in the context of armed conflict. The question was whether the Torture Convention had the effect, without saying so expressly, of waiving the immunity which would otherwise have been available. In his view it did not have that effect.

The majority view however was that this was its effect, by necessary implication. But it was important to note, as I said in my judgment, that the effect of the allegations by the Spanish prosecuting authorities was that the House was not dealing with isolated acts of torture committed by officials employed by the state. It was dealing with a course of conduct as an instrument of state policy. As it fell within the universal criminal jurisdiction mandated by the Torture Convention, it would be regarded as an international crime under customary international law. I suggest that the decision needs to be read in that context. This is an important limitation, should questions be raised about the isolated incidents of torture perpetrated by some members of the military against prisoners in jails in Iraq. I prefer to make no comment about the significance of the decision in the context of allegations about what has been happening in Guantanamo Bay and elsewhere in the course of the campaign against international terrorism.

The judgment in Pinochet 3 has come under scrutiny in the House of Lords only once since it was delivered in March 1999. This was in June 2006 in *Jones v. Ministry of Interior*

of *Saudi Arabia* [2006]. The case was brought by two UK nationals who had been detained in Saudi Arabia and allegedly tortured there. The question was whether Saudi Arabia was immune from the jurisdiction of the UK courts against claims in civil proceedings alleging systematic torture by state officials committed in Saudi Arabia while the claimants were in that state's custody. It was held that, although a universal criminal jurisdiction had been established by the Torture Convention over alleged torturers that operated as an exception to state immunity, there was no evidence that such a jurisdiction had been recognised in respect of civil claims that would enable a victim of torture to seek compensation in the UK in respect of acts committed elsewhere. Nor was there any consensus of judicial and learned opinion that it should be. It was pointed out that article 14 of the Convention gives a right of private action, but only for acts of torture committed in a territory which is under the jurisdiction of the forum state. It was also stressed, as it had been in *Pinochet 3*, that in order to fall within the definition of torture within the meaning of the Convention, the act had to have been inflicted by or with the connivance of a public official or other person acting within an official capacity. This case is a further indication that, despite the prescription of torture by international law, the doctrine of state immunity remains in force as an important international law principle. The circumstances in which the immunity is not available will require in any given case to be scrutinised very carefully.

IV. The Aftermath

The immediate result of our decision in *Pinochet 3* was the announcement on 15 April 1999 that the Home Secretary had decided that Senator Pinochet was to be extradited to Spain. He would have been accused of double standards if he had reached any other decision as by then the UK, along with the U.S. and other countries, was at war with General Milosevic for crimes against humanity and genocide committed in Kosovo. But he reversed his decision almost a year later on the ground that Senator Pinochet's state of health, after two recent strokes and some brain damage, made a fair trial impossible. On 3 March 2000, he departed for Chile with what some observers described as surprising agility. A cartoon was published in *The Times* of London showing a wheelchair left at the bottom of the steps leading up his aircraft, up which he was seen to be sprinting as he made good his escape.

At the end of the section of my judgment in which I identified the charges which were relevant to the question of immunity I said that, as far of the law of the UK was concerned, the only country where Senator Pinochet could be put on trial for the full range of the offences that had been alleged against him by the Spanish judicial authorities was Chile. Writing in January 2000, when it was already becoming clear that he was likely to be sent home to Chile for health reasons, a commentator acknowledged that he should have been put in the dock there in the first place. As we all know, steps were taken to put him on trial in Chile after his return to that country. But by then it was too late. His declining state of health made this impossible. He died aged 91 on 11 December 2006, without ever having to go into court to face the prosecutor.

